STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF TORI CARTER, by Personal Representative BRENDA CHAMBERS,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant,

and

LIEUTENANT DONALD HOLLINS,

Defendant-Appellant,

and

SERGEANT MARSHALL,

Defendant,

and

P.D.O. CARTER,

Defendant-Appellant,

and

P.D.O. CROUCH,

Defendant.

UNPUBLISHED
June 28, 2005

Nos. 253820, 253896, 253960, 254160
Wayne Circuit Court
LC No. 01-112012-NO

Before: Talbot, P.J. and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant Lieutenant Donald Hollins and defendant Detroit Police Officer William Carter appeal an order denying their respective motions for summary disposition regarding plaintiff's claim of gross negligence based on governmental immunity, and plaintiff's claim of intentional infliction of emotional distress. On appeal, defendants Hollins and Carter both argue that the trial court erred when it denied the motions because (1) no evidence existed to satisfy the legal requirements to avoid governmental immunity regarding the gross negligence claim, and (2) no evidence existed to establish the legal requirements of a claim for intentional infliction of emotional distress. After reviewing the record, we agree with defendants, and reverse.

This case arises out of the death of plaintiff's decedent, then-inmate Tori Carter, during her detention at Wayne County Jail on April 18, 2000. Plaintiff's decedent and her sister Angela Orr were arrested as a result of their physical altercation with shovels in their yard. Upon plaintiff's decedent's detention at the jail at about noon, she complained that she was having chest pains and difficulty breathing and stated that she would like to go to the hospital. Officers did not transport her to the hospital at any time during her stay in jail. Plaintiff's decedent died in her cell at approximately 5:00 p.m. as a result of a heart attack.

This Court reviews de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Both defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(10). MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff's claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party. *Id*.; MCR 2.116(G)(5). Where the proffered evidence fails to establish that a disputed material issue of fact remains for trial, summary disposition is properly granted to the party so entitled as a matter of law. MCR 2.116(C)(10), (G)(4), (I)(1); *Maiden, supra*.

"We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) to determine if the moving party was entitled to judgment as a matter of law." *McDowell v City of Detroit*, 264 Mich App 337, 346; 690 NW2d 513 (2004). A motion under MCR 2.116(C)(7) "'tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.'" *Id.* at 345, citing *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998); see also MCR 2.116(G)(5). A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting all well-pleaded allegations as true, and construing all evidence and pleadings in the light most favorable to the nonmoving party. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004).

We will first address defendant Hollins' issues on appeal. Defendant Hollins first argues that the trial court improperly relied upon an investigative report prepared by the Detroit Police Department referred to as the Board of Review Report ("the report"). Because defendant Hollins' counsel did not object on this basis below, we will review this unpreserved evidentiary issue to determine whether there was plain error affecting defendant Hollins' substantial rights. *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

In his brief on appeal, defendant Holllins cites to six pages of the summary disposition motion transcripts wherein he claims the trial court errantly considered the report admissible.

Clearly, evidence necessary to withstand a motion for summary disposition must be substantively admissible at trial. MCR 2.116(G)(6); *Maiden, supra,* 461 Mich 121. However, contrary to defendant Hollins' allegations, never on the particular pages he points to, or on any other page of the transcripts does the trial court specifically state that it found the report itself admissible or that it was relying on the conclusions of the report in its findings regarding defendant Hollins.

A careful reading of the transcripts reveals that the trial court did rely on representations made in a statement taken by the Board of Review in reference to Sergeant Marshall, a defendant not a party to this appeal, but not defendant Hollins. Defendant Hollins' counsel did not object to the report itself or any supporting documentation accompanying the report at any time during the motion. The trial court never referenced or even mentioned the report at all on the record when it delivered its findings concerning defendant Hollins. Because defendant Hollins has not established that the trial court relied on the challenged evidence in making its ruling regarding defendant Hollins, there has been no error affecting defendant Hollins' substantial rights.[1]

Defendant Hollins also argues that the trial court mixed the concepts of gross negligence and intentional torts at the summary disposition hearing and improperly applied the gross negligence standard to the tort of intentional infliction of emotional distress. After reviewing the transcripts, we have not discovered any indication in the record that the trial court improperly applied a lesser incorrect standard in making its findings regarding defendant Hollis. Further, a trial court is presumed to know the law. *People v Sherman-Huffman*, 466 Mich 39, 43; 642 NW2d 339 (2002); *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002). Defendant Hollins has not established that the trial court errantly allowed plaintiff to establish the tort of intentional infliction of emotional distress by some lesser inappropriate standard.

Next, defendant Hollins argues that the trial court improperly denied his motion for summary disposition on plaintiff's claim for gross negligence because he was governmentally immune from liability under MCL 691.1407(2). Under the governmental immunity statute, MCL 691.1407(2), a municipal employee is immune from tort liability if: (1) the employee reasonably believes that his actions are within the scope of his authority, MCL 691.1407(2)(a); (2) the employee is exercising or discharging a governmental function, MCL 691.1407(2)(b); and (3) the employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage," MCL 691.1407(2)(c). *Dean v Childs*, 262 Mich App 48, 57; 684 NW2d 894 (2004). The statute defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id*., citing MCL 691.1407(2)(c). Our Supreme Court has determined that "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. *Robinson v Detroit*, 462 Mich 439, 458; 613 NW2d 307 (2000).

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[1] We need not express an opinion regarding the admissibility of the report, especially considering the fact that without an objection, the issue was never addressed and decided by the trial court. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).

The only element at issue here is the third component of the governmental immunity statute, MCL 691.1407(2)(c). The trial court did not make any specific findings relating to that subsection other than the conclusion that when viewing the facts in the light most favorable to plaintiff, reasonable minds could differ regarding whether defendant Hollis' conduct constituted gross negligence. Pursuant to MCL 691.1407(2)(c), there are two separate inquiries: 1) whether defendant Hollin's conduct amounted to "gross negligence," and, 2) if so, was the conduct *the* proximate cause of plaintiff's decedent's injuries or death.

The evidence shows that on the date in question, plaintiff's decedent was brought in to the police department, finger-printed, and escorted to her cell some time around 12:20 p.m. At this time plaintiff's decedent was walking on her own and communicating. Plaintiff's decedent smelled of alcohol and was very upset and irate. Orr, plaintiff's decedent's sister, informed officers that plaintiff's decedent had been smoking crack and was an addict. Defendant Carter informed defendant Hollins that plaintiff's decedent complained of chest pains around 12:30 p.m. Taking the evidence in the light most favorable to plaintiff, we must then believe plaintiff's version of the facts: that upon learning of plaintiff's decedent's medical condition, defendant Hollins did not order a transport for plaintiff's decedent, did not inform his replacement about the situation, took no other action, and left his shift for the day thirty to forty-five minutes later.

Even assuming plaintiff's version of the facts is true, we conclude that the facts do not rise to the level of gross negligence. The record evidence displays that plaintiff's decedent had complained of chest pains and stated that she had not taken her medication in three days while at the police department. However, at the same time, plaintiff's decedent was walking on her own power, was successfully finger-printed, and was able to communicate. Plaintiff's decedent was a 34-year-old woman that during the approximately thirty to forty-five minutes defendant Hollins was in the precinct, displayed no overt physical symptoms indicating a risk of heart disease or failure. Admittedly, plaintiff's decedent was very upset, loud, and irate during this time. But this anxiety could have been attributed to any of multiple origins including her arrest and detention in jail, her recent physical altercation with her sister, her continuing arguing match with Orr at the station, or the lingering effects of drug or alcohol abuse. When defendant Hollins left the station, plaintiff's decedent, although still complaining of physical distress, was still ambulant, communicative, and displaying behaviors that could simply have been associated with general anxiety rather than obvious and immediate symptoms of heart trauma.

Further, there is no evidence that defendant Hollins was aware of plaintiff's decedent's medical history, that he actually came into contact with plaintiff's decedent while he was at the precinct, or that in his role he was required to come into contact with plaintiff's decedent. Viewing the facts in the light most favorable to plaintiff, the facts do not display conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result to plaintiff's decedent under the circumstances of the case. Because plaintiff has not established the necessary level of negligence as required by MCL 691.1407(2)(c), we need not engage in an analysis of proximate cause.

Defendant Hollins also argues that the trial court improperly denied his motion for summary disposition on plaintiff's claim for intentional infliction of emotional distress because plaintiff has not established that a genuine issue of material fact exists regarding whether his conduct was extreme and outrageous. In *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686

NW2d 273 (2004), this Court[2] set forth the following standards relevant to claims of intentional infliction of emotional distress:

> To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery. [Citations omitted.]

Further, "[l]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). "The threshold for showing extreme and outrageous conduct is high. No cause of action will necessarily lie even where a defendant acts with tortious or even criminal intent." *VanVorous, supra*, 262 Mich App 481, citing *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985). The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to claim, 'Outrageous!'" *Roberts, supra*, 603.

Plaintiff contends that defendant Hollins' actions may reasonably be construed as extreme and outrageous conduct that caused plaintiff's decedent severe emotional distress. Again, taking the facts in the light most favorable to plaintiff, we must believe plaintiff's version of the facts, that defendant Hollins, although aware that plaintiff's decedent had complained of chest pains, did not order a transport for plaintiff's decedent, and did not tell his replacement about the situation. However, that evidence must be balanced with other relevant facts of the case.

It is not disputed that defendant Hollins maintained ultimate custody and control of plaintiff's decedent for only forty-five minutes before his shift ended, and that during this time plaintiff's decedent was walking on her own power, was successfully finger-printed, and was able to communicate. Also, plaintiff's decedent was only thirty-four years old and displayed no overt physical symptoms indicating a risk of heart disease or failure that separated her in some way from the general population of inmates at the jail. Record evidence shows that plaintiff's decedent was very upset, loud, and irate upon arriving at the station. Again, these behaviors could have been associated with several other root causes of anxiety other than a claim for immediate medical assistance and could have actually masked plaintiff's decedent's need for medical attention.

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[2] Although this Court has repeatedly recognized the existence of the tort of intentional infliction of emotional distress, our Supreme Court has not yet done so. *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004)

It seems apparent that defendant Hollins mistook plaintiff's decedent's behaviors as cries for attention rather than evincing a true need for medical care. While defendant Hollins' decision-making process was ultimately flawed and his inaction could even amount to negligence, it cannot reasonably be said to rise to the level of extreme and outrageous conduct. Further, plaintiff has presented no proof of intent or even recklessness on the part of defendant Hollins. For these reasons, when reviewing all of this evidence in a light most favorable to plaintiff, we conclude that defendant Hollins' conduct was not extreme or outrageous.

Finally, we need not address defendant Hollins' final argument regarding plaintiff's request for exemplary damages under MCL 600.2922 because the resolution of the remaining issues on appeal render this issue moot.

We will next address defendant Carter's issues on appeal. Defendant Carter first argues that the trial court improperly denied his motion for summary disposition on plaintiff's claim for gross negligence because he was governmentally immune from liability under MCL 691.1407(2). Like the analysis relating to defendant Hollins above, the only element at issue here is the third component of the governmental immunity statute encompassing gross negligence and proximate cause, MCL 691.1407(2)(c). Again, MCL 691.1407(2)(c) requires two inquiries, whether defendant Carter's conduct amounted to "gross negligence" and if so, was the conduct *the* proximate cause of plaintiff's decedent's injuries or death. In the instant case, the trial court found that because defendant Carter was in custodial control of plaintiff's decedent and allegedly observed her "rolling on the floor and foaming at the mouth" reasonable minds could differ whether defendant Carter was grossly negligent.

Defendant Carter was the "doorman" or "turnkey" on duty when plaintiff's decedent was brought into the station, finger-printed, and escorted to her cell some time around 12:20 p.m. on the date in question. There is no dispute that defendant Carter informed defendant Hollins that plaintiff's decedent complained of chest pains around 12:30 p.m. Ruby Ward, plaintiff's decedent's cellmate, testified that at one point defendant Carter notified plaintiff's decedent that a car was coming for her. Ward also testified defendant Carter responded to one of plaintiff's decedent's complaints by stating "you didn't want your medication when you was out there fighting and smoking." When considering the facts in the light most favorable to plaintiff, even assuming that defendant Carter did not inform his replacement or defendant Hollins' replacement of plaintiff's decedent's condition prior to leaving the precinct, the facts do not rise to the level of gross negligence.

Plaintiff argues that defendant Carter was grossly negligent because although he reported the situation to his first supervisor, he then ignored the situation and in fact scorned plaintiff's decedent. There is no dispute that defendant Carter informed his supervisor of plaintiff's decedent's complaints and her vocalized need for medication almost immediately after conversing with plaintiff's decedent even though plaintiff's decedent's own sister stated that plaintiff's decedent was a "faker" and urged him not to believe her. Also, it is not disputed that defendant Carter did look in on plaintiff's decedent while she was in her cell more than once, even if evidenced by distasteful exchanges that took place. Further, Ward's testimony that defendant Carter told plaintiff's decedent that a car was coming indicated that he believed a transport had been ordered as a result of his communication with defendant Hollins.

Even viewing the facts in the light most favorable to plaintiff, it cannot reasonably be said that defendant Carter was grossly negligent when he took plaintiff's decedent's complaints seriously enough to relay them to his supervisor, checked in on plaintiff's decedent more than once despite Orr's loud protest's and characterizations, and finally actually did inform her of his belief that a transport to the hospital had been ordered. These facts do not display conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result to plaintiff's decedent. Like defendant Hollins, because plaintiff has not established the necessary level of negligence as required by MCL 691.1407(2)(c), we need not engage in an analysis of proximate cause.

Finally, defendant Carter argues that the trial court improperly denied his motion for summary disposition on plaintiff's claim for intentional infliction of emotional distress because plaintiff has not established that a genuine issue of material fact exists regarding whether his conduct was extreme and outrageous. Plaintiff contends that defendant Carter's actions may reasonably be construed as extreme and outrageous conduct that caused plaintiff's decedent severe emotional distress. There is no dispute that defendant Carter informed his supervisor of plaintiff's decedent's complaints and her request for medication, took plaintiff's decedent's complaints serious enough to report them despite the fact that Orr had repeatedly characterized plaintiff's decedent as a "faker" and a crack addict and urged him not to believe her, and looked in on plaintiff's decedent while she was in her cell more than once. Further, Ward's testimony that defendant Carter told plaintiff's decedent that a car was coming indicated that he believed a transport had been ordered as a result of his communication with defendant Hollins. The record displays that defendant Carter recognized plaintiff's decedent's circumstance and attempted to get assistance for her while acting within the bounds of his rank. No average member of the community would exclaim, "Outrageous!" at defendant Carter's activities. *Roberts, supra*, 603. Further, plaintiff has presented no proof of intent or even recklessness by defendant Carter.

Plaintiff also claims that defendant Carter ignored plaintiff's decedent's cries, called her names, and turned up a radio in order to drown out her cries. Taking the facts in the light most favorable to plaintiff, there is evidence in the record supporting plaintiff's claims that defendant Carter did make some unpleasant comments to plaintiff's decedent. For example, Ward testified that he stated "you didn't want your medication when you was out there fighting and smoking" among other comments. However, plaintiff cannot establish extreme and outrageous behavior by focusing on the language defendant Carter used, liability does not extend to insults or indignities. *Graham, supra*, at 674. For these reasons, when reviewing all of this evidence in a light most favorable to plaintiff, we conclude that defendant Carter's conduct was not extreme or outrageous.

Reversed. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio